



Comptroller General  
of the United States

Washington, D.C. 20548

~~05-19-91~~  
143810

## Decision

**Matter of:** EMS Development Corporation

**File:** B-242484

**Date:** May 2, 1991

S. Steven Karalekas, Esq., Karalekas & McCahill, for the protester,  
Joseph J. Kelley, Esq., for Raytheon Company, an interested party,  
John B. Bennett, Esq., and Robert J. Boardman, Department of the Navy, for the agency,  
Catherine M. Evans, David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest is sustained where agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis.

### DECISION

EMS Development Corporation protests the award of a contract to Raytheon Company under request for proposals (RFP) No. N00024-90-R-2141, issued by the Naval Sea Systems Command for the manufacture and installation of equipment for the magnetic silencing facility at Kings Bay, Georgia. EMS principally alleges that the technical evaluation was biased in favor of Raytheon, that the price evaluation was improperly conducted, and that, in view of the allegedly flawed evaluations, award to Raytheon at a price higher than EMS' price was improper.

We sustain the protest.

The purpose of the magnetic silencing facility (MSF) is to measure the magnetic signatures of TRIDENT nuclear submarines and adjust their magnetic profiles in order to reduce the likelihood of their detection. The Navy currently operates such a facility in Bangor, Washington, which was outfitted by Raytheon under a contract awarded in 1978. Based on its experience with the Bangor contract, for which Raytheon was the only offeror under a competitive solicitation, the Navy

initially concluded that only Raytheon was capable of meeting the Kings Bay requirement, and announced an intended sole-source award to that firm in the Commerce Business Daily on March 6, 1990. The Navy sent Raytheon a copy of the RFP on March 30. Between April 6 and 24, Raytheon forwarded to the Navy four sets of questions regarding the RFP and the technical specification. The Navy provided its answers to the questions in a six-page response on May 10.

Meanwhile, EMS had requested a copy of the solicitation, and on April 26 protested the sole-source procurement to our Office, alleging that it was capable of performing the work. In response to the protest, the Navy issued a competitive solicitation on June 29. Both Raytheon and EMS responded to the solicitation with questions, which were answered in an amendment to the RFP. Both firms submitted proposals by the amended August 28 due date; based on the initial technical evaluation, the Navy determined that both proposals were in the competitive range. Following written discussions and submission of best and final offers, the Navy determined that award to Raytheon was in the best interest of the government, and awarded the contract on December 21. Upon learning of the award, EMS filed this protest on December 28.

#### COMPETITIVE ADVANTAGE

EMS alleges that, by virtue of discussions the Navy held with Raytheon when it was proceeding with this acquisition on a sole-source basis, Raytheon had an unfair competitive advantage over EMS after the procurement was opened to competition. We agree.

It is a fundamental principle of competitive negotiation that offerors must be treated equally by a procuring activity. Union Carbide Corp., 55 Comp. Gen. 802 (1976), 76-1 CPD ¶ 134. An essential element of that treatment involves providing offerors with identical statements of the agency's requirements so as to provide a common basis for the submission of proposals. Id. Thus, under the Federal Acquisition Regulation (FAR), any information that is given to a prospective offeror under a negotiated procurement must be promptly furnished to all other prospective offerors as a solicitation amendment if the information is necessary in submitting proposals, or if the lack of such information would be prejudicial. FAR § 15.410(c); University Research Corp., 64 Comp. Gen. 273 (1985), 85-1 CPD ¶ 210. The information given to Raytheon in answer to its questions about the specifications was provided in the context of a sole-source procurement, so there was no need at that time to issue an amendment incorporating the information. Nonetheless, once the planned sole-source acquisition was converted to a competitive one, EMS was at a disadvantage relative to

Raytheon because the information already furnished Raytheon, as discussed below, was material for purposes of preparing a technical proposal, but never was incorporated in the RFP or otherwise furnished to EMS.

The FAR does not specifically address the agency's responsibility for disseminating information originally provided to one firm in connection with a planned sole-source award, where the agency subsequently decides to compete the requirement, and we have not previously addressed similar facts. We think the principle underlying FAR § 15.410(c)--that offerors must be provided with equal information to assure competition on an equal basis--renders it improper for an agency to conduct a competitive procurement after initially giving the intended sole-source contractor material information for use in preparing its technical proposal, as the Navy did here, without providing that information to the other competing firms. See Union Carbide Corp., 55 Comp. Gen. 802, supra; University Research Corp., 64 Comp. Gen. 273, supra.

The Navy argues that the issues raised by Raytheon in its questions were "mooted" by the Navy's decision to issue a competitive solicitation. This would only be the case, however, if the questions raised related only to the sole-source solicitation; in fact, the questions related largely to the technical requirements, and remained relevant under the competitive RFP. Of the 67 questions Raytheon submitted regarding the sole-source RFP, 64 concerned statement of work requirements, the technical specification, or technical proposal preparation; the Navy answered all of these. The questions and answers offered a number of clarifications to the statement of work and technical specification which, we think, the Navy reasonably could have expected would be helpful to Raytheon in preparing its proposal, including five questions to which the Navy responded by stating that the specification could not be changed. Although a few of Raytheon's questions were raised again during the competitive procurement and were answered in amendments to the RFP, the vast majority were not. For example, Raytheon inquired about the required low frequency signal dynamic range for the alternating magnetic field measurement system; the Navy responded with the required dynamic range. This information was not given to EMS with the competitive RFP. In its response to another question, the Navy agreed to a requested change in the specified characteristics of the anti-aliasing filter; however, this change was not reflected in the competitive RFP.

EMS' lack of equal information clearly had an impact that was reflected in EMS' evaluation. For example, Raytheon asked whether the government-owned software in use at the Bangor MSF would be supplied to the contractor. The Navy replied that it

would not provide the software, but that it would eventually provide a magnetic media copy of the Bangor source code. Thus, Raytheon knew that the Bangor software would not be made available to it as government-furnished property. EMS, on the other hand, assumed in preparing its proposal that the Bangor software would be made available to it since the software is government property; EMS' proposal was downgraded for failing to adequately discuss its software approach. The Navy also clarified for Raytheon certain sensor design requirements, but did not do so for EMS; the Navy later listed EMS' failure to describe its sensor designs as a deficiency in its proposal.

We conclude that the Navy should have provided EMS with the same information provided Raytheon, and that its failure to do so left EMS at a competitive disadvantage that had a negative effect on the evaluation of its technical proposal.

#### PRICE EVALUATION

EMS also alleges that the Navy improperly adjusted its proposed price upward by \$2.4 million. While we need not address this issue because we sustain the protest on other grounds, we note that the RFP calls for a fixed-price incentive contract; accordingly, the RFP provided for a ceiling price of 130 percent of the offeror's proposed target price, and a sharing arrangement under which the contractor is responsible for 35 percent of any actual costs exceeding the target cost up to the 130 percent price ceiling, at which point the contractor becomes responsible for all additional costs. Based on our review of the record, it appears that the Navy's cost evaluation, which appears to have measured what the Navy believed to be the likely cost to the government, may have been based on the amount by which EMS' costs were expected to exceed its proposed target cost without regard to the fact that the government would only be responsible for 65 percent of those excess costs up to the ceiling price.

In addition, the adjustments the Navy made to EMS' proposed costs are not supported by the record. For example, the Navy adjusted EMS' proposed overhead costs upward by \$1.2 million by applying an overhead rate significantly higher than the rate proposed by EMS. Although EMS had explained in its cost proposal the basis for its proposed rate, the Navy rejected EMS' proposed rate in favor of the Defense Contract Audit Agency's estimate, even though DCAA admitted it was unable to calculate projected overhead rates without cost and pricing data, which were not required under the RFP. While the RFP stated that proposed prices would be compared to DCAA estimates, nothing in the agency report on the protest or in the price evaluation itself explains why the Navy rejected EMS' justifications for its proposed lower overhead rate in favor of DCAA's estimate, which admittedly did not encompass

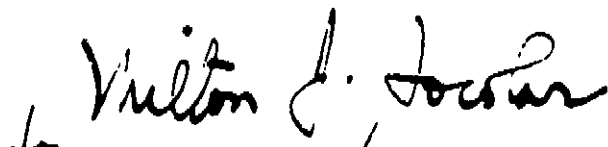
the considerations set forth in EMS' price proposal. In addition, we note that it appears that the Navy rejected EMS' proposed materials costs, including those of subcontractors, in favor of its own estimates, based solely on its experience with Raytheon's 1978 contract, rather than on any cost or pricing data from Raytheon, EMS or their subcontractors.

#### CONCLUSION

Although EMS' technical proposal received a considerably lower score than Raytheon's, the record shows that most of the difference between the offerors' scores is attributable to EMS' lower score under the heavily weighted technical understanding/approach factor. It thus is possible that the offerors' relative positions would be different if EMS and Raytheon had been afforded an equal basis for preparation of their proposals. We conclude that these actions had a potentially significant effect on EMS' competitive position in the procurement.<sup>1/</sup>

Based on the foregoing, we sustain the protest. By letter of today to the Secretary of the Navy, we are recommending that the agency issue an amendment to the RFP incorporating the substance of Raytheon's questions and the Navy's answers; request revised proposals from both offerors; and perform new technical and price evaluations, taking into consideration our finding regarding the price evaluation. If EMS is the successful offeror under the new evaluation, the Navy should terminate Raytheon's contract for the convenience of the government and make award to EMS, if otherwise appropriate. We also find that the protester is entitled to recover its costs of filing and pursuing the protest; EMS should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(d) (1991).

The protest is sustained.

  
for Comptroller General  
of the United States

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<sup>1/</sup> EMS also alleges that the Navy was biased in favor of Raytheon. While we find that the Navy afforded Raytheon an improper competitive advantage by failing to provide EMS with the same information it provided Raytheon, we find no proof of bias. See Institute of Modern Procedures, Inc., B-236964, Jan. 23, 1990, 90-1 CPD ¶ 93.